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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

PNEUMO ABEX LLC,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

MICHAEL BRADFORD et al.,

Real Parties in Interest.

B212060

(L.A.S.C. No. BC368842)

OPINION AND ORDER
GRANTING PEREMPTORY
WRIT OF MANDATE

ORIGINAL PROCEEDINGS in mandate. Robert H. O'Brien, Judge. Petition granted.

Brydon Hugo & Parker, Edward R. Hugo, Donna L. Maul and Thomas J. Moses for Petitioner.

No appearance for Respondent.

No appearance for Real Parties in Interest.

INTRODUCTION

We hold that, in this unique situation, where a party acts immediately upon service of notice of the assignment of the case to a master calendar, to file and serve a peremptory challenge pursuant to Code of Civil Procedure section 170.6, the challenge to the judge was timely filed.¹

BACKGROUND

On November 6, 2008, on instructions from the master calendar department, the Honorable Mary H. Strobel assigned the matter of Los Angeles County Superior Court case No. BC368842, entitled Michael Bradford et al. v. A.W. Chesterson Company et al., designated as a long cause matter, to the Honorable Robert H. O'Brien. The minute order shows that "plaintiff" was notified by telephone and that plaintiffs' counsel was to give notice. The minute order further provides: "This is a *master calendar assignment*, and any challenge pursuant to CCP 170.6 *must be made forthwith today*, orally or in writing, prior to the time set for the first appearance of any party or counsel before the court where the matter is assigned for trial, and if orally made, confirmed by a written motion filed *today*."

Counsel for plaintiffs Michael Bradford and Terry Bradford served notice on counsel for Pneumo Abex LLC ("Abex") via facsimile that day at 3:22 p.m. A "Setting Status Conference" was set to be heard by Judge O'Brien the next day. The record discloses that no copy of the minute order was included in the papers forwarded by facsimile.

On November 7, at 8:15 a.m., before Judge O'Brien took the bench, Abex's counsel, Michael H. Schuck of Prindle, Decker & Amaro, LLP, told Judge O'Brien's clerk that Abex was in the process of filing a peremptory challenge to Judge O'Brien.

¹ Unless otherwise noted, all statutory references are to the Code of Civil Procedure.

When Judge O'Brien took the bench, the following transpired: "Mr. Schuck: I just hope the Court is aware we are filing a 170.6 peremptory challenge this morning. And it will be filed this morning and served on all parties. [¶] The Court: Okay. They were supposed to be filed yesterday either orally or in writing. That was the assignment. [¶] Mr. Schuck: The issue for us, your Honor, is that we did not receive word of this status conference until late yesterday. And this was in time in order to get the— [¶] The Court: But you are allowed to do it orally on the phone. That's why we—*so it would be untimely if it's being filed this morning*, okay?"

Immediately, Stephen Fishback, counsel for plaintiffs Michael Bradford and Terry Bradford, responded: "Well, let me just make sure we—I don't want to necessarily cloud the record, but let me be clear. Firstly, my office got word of the assignment by phone sometime late yesterday morning. Yesterday afternoon my office called and requested that this matter be set over until Monday because of scheduling and availability issues in my office. We were told the Court had left for the day and was unavailable for any purpose. And at that point in time, we sent notice to all defendants which was sometime again late afternoon. I don't even know if there was an opportunity to file a 170.6 challenge. And I don't want to be later somehow the cause or root of this. So we should be clear."

In support of the verified petition, Thomas J. Moses, of Brydon Hugo & Parker, counsel for Abex on the within petition, states that Carla Lynn Crochet, of Prindle, Decker & Amaro, LLP, reviewed the facsimile at approximately "4:30 p.m. on the afternoon of November 6, 2008. After reviewing same, Ms. Crochet determined that Abex would file a challenge to Judge O'Brien under Code of Civil Procedure section 170.6, and -- due to the lateness of the hour and the inability to file any written papers until the following morning -- called Judge O'Brien's courtroom to attempt to give oral notice of Abex's intention. There was no answer."

DISCUSSION

In general, a party has 10 days in which to file a peremptory challenge: “If directed to the trial of a cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance.” (§ 170.6, subd. (a)(2).) However, where the assignment is to a master calendar, “the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial.” (*Ibid.*)

Subdivision (c) of local rule 7.5 for the Los Angeles Superior Court provides: “A reassignment of a case for trial from one judge to another made by the Presiding Judge or Assistant Presiding Judge is an assignment from the Master Calendar for purposes of Code of Civil Procedure Section 170.6.”

Subdivision (d) of local rule 7.5 for the Los Angeles Superior Court provides, in pertinent part: “When an M/C case is assigned for trial, challenge must be made orally in open court or in writing in the Master Calendar Department from which the case is assigned. If counsel have been placed on call and the assignment is made by telephone, the challenge must be stated orally during the telephone call in which the assignment is made, and must be confirmed in writing within four court hours by delivering a written challenge to the Master Calendar Department from which the case was assigned.

“When a case is reassigned, by or upon the authority of Department One or another Master Calendar department, from an I/C court to another court for trial or other limited purposes, the following rules apply: if the reassignment is made while counsel are present in the I/C courtroom, the challenge must be made orally in open court or in writing at the time of reassignment. If counsel have been placed on call and the assignment is communicated by telephone, the challenge must be stated orally during the telephone call in which the assignment is communicated, and must be confirmed within

four court hours by delivering a written challenge to the court from which the telephone call was made.”

As stated at the hearing by Stephen Fishback, counsel for plaintiffs Michael Bradford and Terry Bradford, his office served the notice of the assignment to Judge O’Brien via facsimile after “the Court had left for the day and was unavailable for any purpose.” Abex’s counsel Carla Lynn Crochet, not aware that the Court “was unavailable for any purpose,” telephoned the courtroom. The telephone not having been answered, Abex’s counsel reasonably concluded that the courtroom was closed for the day. Abex filed the peremptory challenge first thing the next day. Under these unique circumstances, the peremptory challenge was timely filed.

As there is not a plain, speedy and adequate remedy at law, and in view of the fact that the issuance of an alternative writ would add nothing to the presentation already made, we deem this to be a proper case for the issuance of a peremptory writ of mandate “in the first instance.” (Code Civ. Proc., § 1088; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) Opposition was requested and the parties were notified of the court’s intention to issue a peremptory writ. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) No opposition has been filed.

DISPOSITION

THEREFORE, let a peremptory writ issue, commanding respondent superior court to vacate its order of November 7 2008, striking Petitioner's peremptory challenge pursuant to Code of Civil Procedure section 170.6, and to issue a new and different order honoring same, in Los Angeles Superior Court case No. BC368842, entitled Michael Bradford et al. v. A.W. Chesterson Company et al. The matter shall be assigned to a different judge forthwith.

All parties shall bear their own costs.

NOT TO BE PUBLISHED.

THE COURT:

MALLANO, P.J.

ROTHSCHILD, J.